

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5183 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements? YES
2. To be referred to the Reporter or not? YES :
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? NO
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? NO
5. Whether it is to be circulated to the Civil Judge? : NO
NO

MOHIBULLAH USMANBHAI SHAIKH

Versus

STATE OF GUJARAT

Appearance:

Special Civil Application No. 5183 of 1998

PARTY-IN-PERSON for Petitioner

GOVERNMENT PLEADER for Respondent No. 1

RULE SERVED for Respondent No. 2, 5

MR SP HASURKAR for Respondent No. 4

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 28/09/1999

ORAL JUDGEMENT

1. The petitioner has claimed the following reliefs
in this petition substantively :-

[a] Quashing and setting aside the order dated
31/1/95 [Annexure 'I'] directing respondent no.1
to exercise his vested power under proviso [iii]

below Rule 161 of B.C.S.R. together with continuity of service with all consequential benefits forthwith till the respondent nos. 2 onwards may be finalise all the terminal benefits on or before the date[s] by which they like to retire the petitioner 'OR' an award Rs.2 lakhs per detaining be awarded to petitioner.

[b] quashing and setting aside later part of order dated 4/11/96 directing respondent No.2 to treat the impugned periods as on duty for all purposes by maintaining the leave balance of petitioner for encashment.

[b-1] quashing and setting aside the part of recoveries from the face of order dated 4/11/1996 [Annexure VII] passed by the respondent no.2 of Rs.63,590/directing the respondent No.5 to refund the aforesaid recoveries affected on 5/11/1996 together with appropriate rate [s] of interest thereon from 5/11/1996 till the date of refund of the same.

[c] to award the compensatory amounts of Rs.6,80,000/- as prayed for vide para [V] at Annexure 'V' and further enhance the said amounts under the circumstances as narrated in ground [G] directing the respondents nos. 2 to 2 to pay the petitioner from the public fund and the said amounts may be recovered from respondent nos. 3 and 5 within the reasonable time.

[c-1] to award the compensatory amounts of Rs.56,00,000/- as prayed for vide Annexure 'X[A]' by raising 50% therein at the time of hearing as the respondent nos. 1 and 2 have failed to decide the issue by their hands.

[d] to take suo motu action in prosecuting the respondent no.2 in lieu of giving false affidavit before this Hon'ble High Court as narrated vide para [II] of Annexure 'IV' and further to sanction an enquiry through Central Bureau of Investigation to enquire the truth of involvement of officers of respondents nos. 1 and 2 in view of facts and circumstances as laid down vide Annexure 'V' for the purpose of prosecuting them as the respondents no. 1 and 2 have failed to take any cognizance thereto.

[e] to direct the respondent No.5 to pay the amounts

of Annexure 'VIII' colly. with 18% interest thereon and further to award the interest at the rate of 18% to the amounts from item nos. 2 to 5 of annexure 'IX' directing the respondent No.5 to work out from their dates of accrual upto their dates of payment within reasonable time.

2. The petitioner was in the first instance compulsorily retired by order dated 17/1/92 w.e.f. forenoon of 18/1/92 with three months notice pay. The State Government on petitioner's representation reinstated the petitioner by order dated 4/1/94. This order also mentioned that, during this period, the petitioner has been paid notice pay pension, gratuity and other retiral benefits. For the recovery of the said amount alongwith for regularising the period during which the compulsory retirement order remained in force, a separate order shall be made. As according to the petitioner, the respondents were not entitled to recover the retiral benefits given in pursuance of order dated 17/1/92 and this would have been resulted in huge recovery on joining, he did not join his duties on reinstatement immediately, but ultimately joined only on 30/1/95. On 31/1/95, he superannuated on attaining the age of 58 years. During the period, until December 1996, the petitioner continued to draw the pension fixed under the compulsory retirement order dated 17/1/92. He has also withdrawn 'death cum retirement gratuity' as well as the commuted pension as per rules of fixation on pension as a result compulsory retirement in 1992. As the petitioner ultimately retired on 1/2/1995 and he was already drawing pension fixed under 1992 and the question of adjustment of amount paid as retiral benefits during the continuance of his service until 31/1/95 was pending consideration, particularly for the reason that no order could be passed for treatment of the period during first retirement because of non-joining by the petitioner until a day before his superannuation, the question of treating this absence from duty was also to be considered. In the first instance, therefore, an order was made on 30/5/96 by treating the entire period of absence from duty from 19/1/92 to 21/5/95 as under :-

[1] From 19/6/92 to 4/1/94 - total 717 days :: Leave without pay.

[2] From 5/1/94 to 30/5/94 - 146 days :: Earned leave with full pay from his balance of leave.

[3] 31/5/94 to 29/1/95 - 244 days :: Against half

pay leave due to the petitioner.

3. Dissatisfied with the same, the petitioner represented with the respondents and the fresh order came to be made on 4/11/96 by considering the entire period from 19/1/92 to 4/1/94 [during which order dated 17/1/92 remained operative], as on duty with entitlement of full pay and allowance, from 5/1/94 to 9/8/94 - 217 days, against the earned leave in balance with full pay. The total balance of earned leave to the credit of the petitioner's account as on the date of retirement was 217 days. Thus, entire leave balance was adjusted against the absence period from 5/1/94 to 9/8/94 and the remainder of the period of absence from 10/8/94 to 29/1/95 - 173 days were adjusted against grant of half pay leave account which was then showing 217 days to his credit. It was further ordered that, from the aforesaid grant of leave, the amount of pension paid during 19/1/92 to 29/1/95 amounts to Rs.45,505/- as well as notice pay for three months is to be adjusted. Thus, a total of Rs.53,592/- on account of pension paid to the petitioner with three months notice pay was ordered to be adjusted against the emoluments payable until the date of superannuation to which the petitioner became entitled as a result of regularisation of entire period of absence from duty.

4. The relief [a] is for seeking a mandamus to the respondents to make an order in favour of the petitioner for continuing him until the petitioner's retiral benefits are determined and paid to the petitioner. In the alternative for non-extension of period, the compensation of Rs.2 lakhs have been claimed.

5. So far as this relief is concerned, in my opinion, the petitioner is not entitled to claim such relief. Rule 161 of the BCSR Rules provides that except as otherwise provided in other clauses, the date of compulsory retirement of a government servant on attaining the age of 58 years. The petitioner has been retired on 31/1/95 on attaining the age of 58 years. For the purpose of aforesaid relief [a], the petitioner relies on proviso [3] to Rule 161[1] which reads as under:-

"Provided he may be retained in service after the date of compulsory retirement only with the previous sanction of Government on public grounds which must be recorded in writing."

6. Obviously, this power can be exercised by the government only in public interest. That is to say, if the retention of the civil servant is in the public interest. This power can not be exercise by the government only for the benefit of the incumbent, whether the retention of the petitioner is in public interest or not after he has attained the age of superannuation on which every government servants should ordinarily retire, is for the government to decide and not for courts to find whether retention of the petitioner is in public interest. The rule also requires that such order is to be made in writing by the Government. The petitioner in fact does not claim to be retained in service on public ground. In my opinion, therefore, the relief claimed by the petitioner in para [a] stated above is misconceived and cannot be granted. As the petitioner is not primarily entitled to be considered for this relief, the question of granting compensation alternatively in case main relief is not granted, also does not arise.

7. For the present purpose, another fact that need to be noticed is that the petitioner had earlier approached this Court by way of filing Special Civil Application No.10212/94 inter alia seeking relief of quashing the order dated 17/1/92 by which the petitioner was compulsorily retired and order dated 4/1/94 by which the petitioner was reinstated alongwith other relief to which reference shall be made later on. This petition was filed after the order dated 17/1/92 has already been set aside by the government on 4/1/94 reinstating the petitioner w.e.f. the date. The grounds for seeking setting aside of the order dated 4/1/94 were that though it is indicated in the order that consequential orders regarding recovery of the amount paid to the petitioner towards pension, gratuity etc. may be passed against the petitioner subsequently, but does not contain any direction regarding the salary to be paid to the petitioner during the period. The Court by order dated 7/12/94, rejected the petition by holding that as the order retiring compulsorily from the services has been set aside, naturally the petitioner would be entitled for the salary for the relevant period. However, the fact that during the period the petitioner has received the retiral benefits is not in dispute, and the petitioner is ordered to be reinstated in service w.e.f. 18/1/92, the respondent no.2 is entitled to recover the amount paid to the petitioner by way of terminal benefits. The court was further of the view that the petitioner is liable to refund substantial amount to the government, the prayer for deciding the petitioners representation against the

order dated 4/1/94 or for that matter, setting aside the order dated 4/1/94 directing to determine the amount of adjustment of emolument and treatment of period separately cannot be granted to the petitioner at this stage.

8. The petitioner filed another petition being Special civil Application No.8295/97 after the aforesaid order dated 4/11/96 was made regularising the period of absence from 19/1/92 to 29/1/95 by treating the entire period between 19.1.92 to 4.1.94 during which the order of retirement remained in force as spent on duty with full pay and allowances and remaining period upto date of joining by sanctioning earned leave with full pay to the extent it was due and remainder with half pay leave. The retiral benefits already paid to the petitioner and the pension which he was continuing to draw were to be adjusted towards payment that became payable to him as a result of above order. The petitioner challenges such adjustment against the retiral benefits that became payable to him as a result of superannuation w.e.f. 1/2/1995. In effect, the petitioner claimed entitlement to entire sum payable as per the determination of pension on his retirement on superannuation without accounting for the amounts already received by him under the previous order of retirement which was set aside to his benefit and he was considered to be in service until he attained the age of superannuation. No grievance whatsoever was raised in the said petition about nonpayment of any dues due to him prior to his retirement remaining outstanding. The said petition has been decided on 27/9/99. While rejecting the claim of the petitioner, the court was of the view that the petition has been filed with dubious intention to claim double payment on the same account and for the same period, as a result, the petition was dismissed with costs. This petition is also aimed at same end. Relief [b] and [b-1] referred to above are likewise claimed with the same object.

9. In the earlier petition, the court has held clearly that in the order of reinstatement, it is implicit that the petitioner is entitled to salary for the relevant period. Though in the first instance by order dated 30/5/96, the respondents erroneously assumed and adjusted the aforesaid period during which the order dated 17/1/92 remained in force against 'leave without pay' and the remaining period of absence from duty against admissible leave. Realising their mistake, on a representation being made by the respondent, modified the same by order dated 4/11/1996 treating the entire period

during which the order dated 17/1/92 remained in force as spent on duty with full pay and allowance and for the remaining period for which the petitioner has not joined duty on his own erroneous assumption and remained absent without obtaining any leave or permission from any competent officer, adjusted by sanctioning leave due to the petitioner in his account by giving him maximum benefit. Earned leave with full pay was sanctioned to the extent he could avail such leave and the remainder by sanctioning leave with half pay. Emoluments thus payable were to be adjusted against the amount already paid during that period as pension and also the notice amount paid to the petitioner, as a result of order of compulsory retirement. By challenging the order, the petitioner wanted to retain the notice pay which was the foundation of the order of compulsory retirement and the pension paid to the petitioner during that period treating him to be on retirement. The petitioner is not entitled to dual payment for the same period, one as a retired personnel and the other as a person continuing in service. As a person continuing in service, he has to account for absence from duty since reinstatement in accordance with law. In that event, he has to return any amount which he has received on the premise that he is a retired government employee and also the amount of notice pay which was paid for the purpose of giving effect to the order of retirement, but for which the order of retirement would become a nullity. This is what the court on earlier occasion in petitioner's own petition, has held against the petitioner. The court in no uncertain terms said that,

"The fact that during the period the petitioner has recovered retiral benefits is not in dispute as the petitioner is ordered to be reinstated in service w.e.f. 18/1/92, the respondent no.2 is entitled to recover the amount paid to the petitioner towards the terminal benefits."

10. For the very same reason, relief [b] referred to above for treating the period of absence from duty as spent on duty and not on leave cannot be granted for the period the petitioner did not join duty after recalling order of retirement and reinstating him by order dated 4/1/94. Such absence from duty could only be adjusted against available balance in leave account, else there will be a break in service and petitioner will be liable to disciplinary action for unauthorised absence from duty. The petitioner in effect claim that though his retirement order dated 17/1/92 has been recalled on 4/1/94, still his continued absence from duty be treated

as period spent on duty, as the period during which the order dated 17/1/92 remained in force, so that he could get full emolument for the period after being reinstated without performing duty for almost one year until a day before he attained age of superannuation and also gets encashment of leave in balance.

11. Vide Relief [B-1], the petitioner claims that against pay and allowances that becomes due to him as a result of reinstatement upto the date of joining viz. from 19/1/92 to 29/1/95, the amount already paid as pension for that period treating him as retired personnel amounting to Rs.45,505/- and notice pay of 3 months on the eve of compulsory retirement Rs.8,085/- totalling Rs.53,950/-, be not adjusted. This relief to double emoluments for the same period cannot be granted for the reason discussed above.

12. The reliefs claimed in para [c] and [c-1] referred to above are the claim of the petitioner by way of damages for something which is not connected with the retiral benefits or with any emoluments to which the petitioner was entitled as a matter of right. While a compensation amount of Rs.6,80,000/- has been claimed, the splitting of which has been detailed by the petitioner in Annexure IV, Rs.50,000/- to build his wife's grave of 15 to 20 years durability by concrete and cement, Rs. 5 lakhs as compensation or damages caused to the applicant on account of death of his wife making him a widower and children motherless and for loss of marital companionship and Rs. 1 lakh as damages caused to the portion of the house of father at village. A sum of Rs.30 lakhs has been claimed by way of damages to crop and T.A. to visit native place. Further claim to Rs.56 lakhs has been laid for the purchase of a house to accommodate his three sons welfare including their marriage life because of non-release of a house loan advance for which he had applied in 1980.

13. All the claims are absolutely irrelevant and fanciful. The claims are unconnected with the service conditions and to claim of the petitioner to the retiral benefits or emoluments. As pointed out earlier, so far as the claim of Rs.56 lakhs is concerned, it has nothing to do with any delay in paying the retiral benefits or any emoluments to which the petitioner was entitled to during the tenure of his service. The fact that under certain scheme, the government permits the loan facility at lower rate of interest to its employees on certain conditions to be fulfilled and could be availed by the petitioner, was not granted at the time when the

petitioned applied in 1980, cannot give rise to a claim for damages. This is apart from the fact that such a claim cannot be entertained in a petition under Article 226 particularly when at any point of time, the petitioner never sought any mandamus or remedy against the rejection or non-grant of loan in respect of application made in 1980. A suit to such claim would be barred by limitation.

14. It is further noticed that the petitioner himself is responsible for delayed settlement of his claim for terminal benefits by firstly not reporting to the duty on reinstatement on assumed ground that the amount paid by way of pension, death cum retiral benefits and by way of commutation of pension in pursuance of the compulsory retirement order is not liable to be adjusted and recovered from him or adjusted against the emoluments that would become due and payable to him on reinstatement as a regular employee and thereafter, indulging into litigation for retaining for double advantage by two successive unfruitful petitions when this was made clear by the order of this Court dated 7/12/1994 in his own petition that on reinstatement, the State is entitled to recover whatever retirement benefits have been paid under the retirement order dated 19/1/72, which has been set at naught by the State Government itself on the representation of the petitioner. Move over, the petitioner was continuously in receipt of the pension that was fixed in 1972 though he has not joined on reinstatement on 4/1/1994 for almost a period of one year, the fault cannot be laid at the doors of the respondents in taking time to determine the petitioner's claim. Moreover, the sums as found due to the petitioner by the respondents have been paid by 1997. According to the detailed furnished by the respondents, about which there is no dispute, that apart from the pension that was being paid regularly to the petitioner, which has been adjusted only against the final amount found payable to the petitioner as a result of reinstatement and regularisation of his period of absence from duty and fixation of pension. The petitioner withdrew the sum of Rs.95,000/- and odd his GPF on 17/4/96 was paid a sum of Rs.1,14,113/- for the duty period from 19/1/92 to 29/1/95 after deducting the amount of pension and notice pay already paid to the petitioner during that period on 1/1/97. The petitioner was paid balance amount on 7/5/97 as a result of revised pension and gratuity etc. This is only to demonstrate that petitioner was not put to any financial difficulties of any sort in carrying out the treatment of his wife on account of delayed settlement of his dues. In fact, apart from an imaginary fabulous

claim of the compensation and a grievance against the adjustment of emoluments already paid, there is no real substantial dispute about other items which shall be seen while considering the relief [e] referred to above. The petition under article 226 cannot be used as a vehicle for raising fanciful claim under cloak of lodging complaints about the delayed terminal dues without consideration of attending circumstances in which determination of terminal dues have been made. I therefore do not find any merit in relief [c] and [c-1] either.

15. The petitioner during the course of argument has submitted summary of his claims divided into four parts, which is kept on record. Part I details the amount paid to the petitioner. Part II relates to the claim of Rs.17,88,868/- consisting interest compensation and litigation expenses which according to the petitioner is subject matter of Special Civil Application No.1362/91 with Civil Application No.872/93 and does not concern with this petition. Part III consists of several items and shall be presently considered and part IV concerns again of compensation to build mausoleums for wife and father of the petitioner, Rs. 10 lakhs for deprivation of fundamental rights of the family members and Rs.60,000 for loss of agriculture crops of native place and other counts. So far as part IV is concerned, for the reasons already discussed above, cannot be considered either.

16. The part III consists of number of claims totalling Rs.3,51,981/-. Two items of Rs.45,505/- and Rs.12,000/consists of the amount paid to the petitioner during 19/1/92 to 25/1/95 which has been adjusted against the amount found payable to the petitioner as a result of reinstatement. As discussed above, relief against adjustment of these sum cannot be granted to the petitioner.

17. Rs.26,000/- has been claimed against the leave encashment of 217 days. This is also discussed above. The petitioner has remained absent from duty without joining in pursuance of the reinstatement order dated 4/1/95. The entire balance of earned leave of 217 days in his leave account has been adjusted against the petitioner's absence from duty by sanctioning leave for those days to regularise the period of absence so that the petitioner may not suffer break in service at the time of retirement. Thus, there was no balance leave at the time of retirement which could be encashed. The claim on the face of it is not justified. Petitioner could get advantage of leave only once.

18. The claim of Rs.13,839/- as dues on account of HRA or compensatory local allowance at the rate at which it was payable at relevant time from February 1992 to January 1995 by treating the petitioner to be at Ahmedabad. The fact remains that the petitioner at the time of his compulsory retirement was at Surendranagar and at the time of reinstatement, he has to join at Surendranagar, since the petitioner ultimately retired from Surendranagar on 31/1/95, his entire period between February 1992 to January 1995 on regularization has been treated to be in service at Surendranagar. That being so, he cannot be granted HRA of different town than at which he was required to serve merely because the petitioner has chosen to remain at Ahmedabad and not joined at Surendranagar at that time.

19. The petitioner has claimed Rs.17,000/towards visit to home town and Rs.2,25,000/- for encashment of LTC for block year 1992-95. The petitioner in fact after being reinstated before joining has applied for grant of advance to avail LTC. No advance was granted as the petitioner did not join. The petitioner's claim ultimately was granted on 25/9/97 by way of 'Leave Travel Concession' encashment under the scheme promulgated by the State Government for that purpose by resolution dated 27th June 1984 inter alia provide that all the employees shall be given option for availing of LTC as per the existing rules or to encash it as per the order dated 27th June 1984. The option for the 4 years block of 1984-85 was to be exercised by the end of 31st August 1984 and in the later block, the option for LTC encashment was to be exercised on 30th June 1984 in the first year of the four blocks. The option once exercised were to be final and request for change in the option was not to be entertained later and was to be exercised for each block separately. In case for option for LTC was exercised, the para 7 of the order envisages that those who prefer to encash the LTC will be given the benefit of 1500 KMs to 2500 KMs to and fro which will be limited to four full tickets by the class of entitlement and if the family consists of lesser number of person, the amount to that extent only will be paid but in case there are more than 4 full ticket members, the encashment shall be confined to four tickets. As the petitioner could not have given option for the block year 1992-95 by 30th June 1995 because of the fact that he was compulsorily retired on 17/1/1992, he could have opted for LTC on being reinstated during that block period. However, instead of opting for leave encashment, the petitioner has in fact opted for availing the actual LTC by seeking advance

before joining any where in September 1994. However, for some reason, the petitioner could not be granted advance. The petitioner did not actually travel either to avail LTC. The reimbursement of full fare for all the eligible members can only be granted in case of actual availing of the LTC. The availing of LTC is not dependant on the release of advance which may not be possible in all cases. The other alternative which the petitioner could have availed at the time of reinstatement of opting for encashment of LTC. Though directly petitioner's case did not fall within the preview of encashment order, still the respondents having realised that the petitioner could not have opted for leave encashment by the date fixed in the order and he has not actually availed the LTC, not to deprive him of the option of encashment of the LTC, the same has been granted keeping in view that the petitioner was not in service for the full block of the period wherein he could have availed the LTC during the remaining period of block. As the encashment of leave concession has been granted in terms of the option that could be availed by the petitioner without actually availing the LTC, no additional payment can be made to the petitioner on the basis that the actual number of members actually entitled to avail the LTC exceeded four.

20. The last amount claimed in this petition in para III is a sum of Rs.12,885/- as a lumpsum retirement traveling amount for shifting to place of settlement.

21. This amount has been admittedly not paid to the petitioner. However, it has been pointed out by the respondents that as per the prescribed procedure where the availing of the actual retiring travelling allowances or lumpsum retiring travel allowance as per the government order dated 1/1/1972, the petitioner has to submit the BTR form No.21 under his signature for the purpose of withdrawing the amount from the treasury. The same form has been submitted to the petitioner time and again, but he has not returned the same to the respondents and therefore, the payment could not be made. However, if the petitioner even now furnishes the BTR form duly signed by him, the amount admissible under the order dated 1/1/72 shall be paid to the petitioner within a reasonable period. The petitioner points out that the BTR form is meant for actual travelling and he was not supposed to sign the given details of dates, and has only to furnish a certificate of its actual user within a period of six months from the date of receipt of the same.

22. Learned counsel for the respondent drew my

attention to Annexure 'H' Government resolution dated 1/7/1980. I am of the opinion that though the petitioner is right in his submission that the form BTR No.21 is the form which was shown to the court for its perusal, whereby withdrawal of lumpsum in like cases has been made, is in fact a travelling allowance bill of actual journey undertaken and no modified form for withdrawal of the lumpsum sum has been provided separately. However, it has been pointed out by the learned counsel for the respondents assisted by the accounts officers that for either purposes, the same form is being used and the withdrawal of the lumpsum amount to be paid to the petitioner is on the basis of signature of the assigned form BTR 21 on which the amount payable as lumpsum are to be filled in which concerns the railway fare of class entitlement, for self and eligible members, as per grade of retiring government employee and transportation costs, as per maximum amount prescribes under the rules, to the home town by giving options. On withdrawal of the said amount, the amount is paid to the petitioner and no details of the actual journey are sought. However, in terms of the circular dated 1st July 1980, the government employee has to give a certificate within a period of six months from the payment of lumpsum amount to the effect that the journey to the required place has been actually undertaken by him. The submission of detailed T.A. bill with vouchers etc. will not be necessary. This is only to ease the procedure for the withdrawal of the amount without necessity of furnishing the vouchers etc. However, does not result in cessation of the necessity of submitting the bills at all. The amount could not be paid to the petitioner because of the procedural problem.

23. Keeping in view of submissions made and willingness shown by the respondents even now to make the payment, if the petitioner fulfills the procedural requirements, it is ordered that, if the petitioner now submits a duly signed BTR form No.21 for the purpose of withdrawal of the lumpsum amount within one month, the respondents shall make the payment of the admissible sum to the petitioner as stated above within a further period of one month. This will be calculated on the basis of destination to home town disclosed in the service book as the petitioner has opted to claim only lumpsum amount. It has to be computed as on the last date of retirement. One cannot fail to notice that petitioner himself is responsible for not getting this payment by taking a very technical stand on procedural requirements to be fulfilled by him before he could get lump sum payment.

24. The petition is accordingly dismissed subject to

orders about his claim to lump sum travelling allowance on retirement as stated above. In the facts and circumstances of the case, the petitioner shall pay the costs of this petition which is quantified at Rs.2,500/-.

parmar*